United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7519

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FOR THE SECOND CIRCUIT

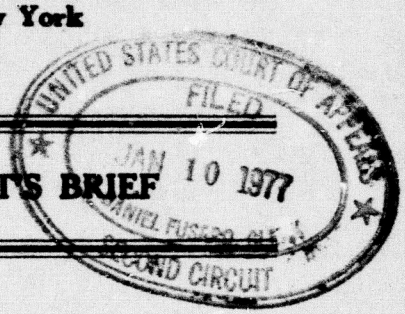
ORIGINAL

ANTHONY MUNOZ,
Plaintiff-Appellee,

against

FLOTA MERCHANTE GRANCOLOMBIANA, S. A.,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York



DEFENDANT-APPELLANT'S BRIEF

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Statement of Issue

I. Pursuant to the 1972 Amendment to 33 U.S.C. Sec. 905 does an injury caused by an unknown latent defect in a cargo stow loaded by an independent stevedoring contractor present a jury question of the shipowner's liability to the longshoreman-employee of the independent stevedoring contractor.

Statement of the Case

Nature of the Case

The plaintiff longshoreman sued the defendant shipowner for injuries sustained while working aboard the CIUDAD DE IBAQUE on November 6, 1973. The suit is necessarily predicated on the shipowner's negligence having occurred subsequent to the 1972 Amendment to 33 U.S.C. Sec. 905. Plaintiff was injured, while walking on cargo that had been stowed the day before by his employer, due to an unknown latent defect in that stow.

Proceedings Below

The District Court, while reserving decision on shipowner's motions for a directed verdict, permitted the case to be decided by a jury which returned a verdict for the plaintiff-longshoreman. After post trial briefs and oral argument, the shipowner's motion for a directed verdict was denied. The shipowner appeals from that denial and submits that there was no question of fact presented at trial upon which the shipowner could be found liable and that the plaintiff's case must be dismissed as a matter of law.

Facts

The following facts are not in dispute. The page references are to the joint appendix with the designation (a). The CIUDAD DE IBAQUE, owned by the defendant, Flota Mercante Grancolombiana (hereinafter referred to as "Flota" or "shipowner") on November 3, 1973 arrived at Pier 3, Port Authority, Brooklyn, N. Y. for the discharging and loading of cargo (129a). Flota contracted with Universal Maritime Services (hereinafter UMS) for UMS

to perform the stevedoring services aboard all its vessels at Pier 3 (93a; 155a).

The crew of foreign flag vessels do not and are not permitted to load and discharge cargo. They are prohibited from performing this work by the regulations of the International Longshoreman's Association (93a) and secondly this type of work is within the expertise of the independent stevedoring contractor, not of seaman (93a).

UMS commenced discharging cargo from the No. 3 hatch of the CIUDAD DE IBAQUE on November 4, 1973, and worked from 8:00 A.M. until 6:00 P.M. (95a; 144a).

Two UMS gangs worked in the No. 3 Hatch on November 5, 1973. One gang completed discharging the cargo between the hours of 8:00 A.M. and 10:30 A.M. (145a), then loaded cargo from 10:30 A.M. to 9:00 P.M. (136a). The second gang of longshoremen loaded cargo in the No. 3 hatch from 8:00 A.M. to 9:00 P.M. (136a; 195a).

Plaintiff fell while walking on cargo stowed in the forward starboard end of the lower hold of the No. 3 hatch at about 10:00 A.M. on November 6, 1973.

It was stipulated that all the cargo that was in the forward starboard end of the lower hold of the No. 3 hatch on November 6, 1973 was loaded in New York on November 5, 1973 by UMS (83a; 100a; 102a; 133a). This cargo consisted of general cargo (152a; 26a).

The plaintiff, Anthony Munoz, had not worked aboard the CIUDAD DE IBAQUE on November 5, 1973 (11a). He was hired at the Union Hall the morning of November 6th, reported to work aboard the vessel at approximately 9:00 A.M. (11a) and was to work in the No. 3 lower hold (lowest level of the hatch). The plaintiff went down the vessel's iron ladder to the deck above the lower hold and there found the ship's port forward escape hatch ladder

was blocked by cargo which had been loaded by UMS in the lower hold (15a). He, therefore, went to the square (center of the hatch) and climbed down to the lower hold by means of a wooden ladder (14a-16a). At that time, approximately 9:00 A.M. the longshoring gang to which he was assigned was loading rolls of paper in the forward square of the lower hold, starboard side (17a).

It was stipulated that these rolls of paper were being stowed aft of the cargo which UMS had finished loading 9:00 P.M. the evening before (83a). The stowage plan clearly delineates that all cargo stowed in the forward starboard side of the lower hold of No. 3 hatch was loaded by UMS in New York (133a; 97a).

The cargo loaded forward was destined for the Port of Callao and as set forth on UMS's Hatch Tallies, was loaded on November 5, 1973 (152a). The UMS Hatch Tally also shows that the rolls of paper were loaded on November 6th (153a).

Plaintiff testified that after the first layer (or Tier) of paper rolls were stowed, plywood dunnage boards were placed on top of them (51a). ("Plywood dunnage (boards) (are) provided so that the tiers could be covered, thereby providing a better work surface upon which to stack the next tier." *Bess* v. *Agromar Line,* 518 F. 2d 738 (4th Cir. 1975).)

Flota's contract with UMS obligates the stevedores to load and lay dunnage boards during loading for proper stowage of cargo (161a).

While loading the second tier of paper rolls, at about 10:00 A.M. two rolls became wedged together so Munoz had to get a crow bar which was on top of the cargo forward of the square (24a-25a).

Munoz stated that this cargo upon which he was walking to get the crowbar was covered with separation paper

(81a). There is no testimony as to whether the separation paper was placed over this cargo by longshoremen the previous evening (November 5th) or on the morning of November 6th (65a). A separation paper was put in place by the stevedores (31a).

Munoz stepped up two or three feet from the rolls of paper onto the forward cargo (77a), walked 2′ to 6′ (79a; 25a) on that cargo which was stowed on a level upward incline (26a; 29a) and then, "That I recall I felt everything, you know, just the floor move from underneath me." (82a; 30a).

Munoz did not know if he went through a hole under the separation paper, whether a carton upon which he stepped caved in or whether the cargo upon which he was walking shifted (61a; 82a).

It cannot be denied that any condition of the stow which caused the plaintiff's injury was one created by the stevedore. There was no actual knowledge of such a condition by the vessel or its crew.

It is strongly urged by the vessel owner that this is a prime example of the type of cases, that Congress legislatively determined, under the 1972 Amendments to the Longshoremen's and Harbor Worker's Act, was one for which the vessel owner is not liable to a longshoreman as a matter of law.

POINT I

The standard of care and duties owed under the amended Compensation Act of 1972.

A. Statute.

Effective as of November 26, 1972, the Longshoremen's and Harbor Worker's Compensation Act was amended and the legal relationships between longshoremen and shipowners was radically altered thereby. Plaintiff no longer has a remedy against the vessel for unseaworthiness, but may only bring an action against the vessel based on negligence. The applicable section of the statute, 33 U.S.C., Par. 905(b), states as follows:

> "b. In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third-party in accordance with the provisions of Section 933 of this Title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof

at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel, except remedies available under this chapter."

B. Legislative background of 1972 Amendment.

The Congressional Committee reports and pre-amendment case law have been discussed at length in several recent cases. See e.g. *Lucas* v. "BRINKNES" *Schiffarts*, 397 F. Supp. 759 (E.D. Pa. 1974) and *Ramirez* v. *Toko Kaium K.K.*, 385 F. Supp. 644 (N.D. Calif. 1975).

The dual purpose of the Amendments was (1) to increase the direct compensation benefits to injure longshoremen and (2) decrease the number of injuries by placing the responsibility for safety and payment on the party who is in the best position to prevent such injuries, that being the stevedore in most instances.

As stated by the House Committee, "The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H.R. No. 92-1441, 92d Cong., 2d Sess.—5 (1972).

The Senate Report likewise stated, "The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." S. Re. No. 92-1125, 92 Cong. 2d Sess.—4.

Whereas, prior to the amendment, the longshoremen received a maximum of $70.00 per week in compensation, today the maximum is $342.54 per week.

As to safety, the Senate Report said, "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the *employer* bears the cost of unsafe conditions, serve to strengthen the *employer's* incentive to provide a safe place to work". Sen. Rep. No. 92-1125, 92d Cong., 2d Sess.—2 (1972) (emphasis supplied).

And as stated in *Lucas, supra,* "Courts should recognize that this duty falls primarily on the stevedore and not on the vessel owner."

To achieve this purpose Congress (1) increased substantially compensation benefits to longshoremen; (2) prohibited the employer's being sued for indemnity under *Ryan;* and (3) eliminated the longshoremen's right to sue the vessel owner for any cause of action other than common law negligence.

Lengthy legislative discussions were held on the proper standard of care owed the longshoremen by the shipowner and is set forth at 92nd Cong., 2d Sess., at pages 270-74 (1972), and as an appendix in *Lucas, supra.*

"Mr. Scanlan. • • •

> "In other words, you would say there could not be any indemnity between the shipowner and the stevedore. If there was shipowner's negligence *and only shipowner negligence* and it was not part of any unseaworthiness, *it was not part of the duty to provide a safe place to work,* then you would restrict, no question, this would cut down on a very substantial part of the third-party cases. . . ." (emphasis supplied)

"Mr. Mittelman. • • •

> "In the case where the stevedore was negligent, you wouldn't have any action against the shipowner because the stevedore's doctrine would be out."

"Senator Eagleton. • • •

"Can we not legislate 'new maritime law' in this situation?"

"Mr. Scanlon.

"Yes; I think that's entirely possible. Mr. Mittelman's suggestion certainly deserves consideration. I would like to • • • see the language that Mr. Mittelman would suggest on that. It is a matter of a very careful draftmanship to find the right language so that we don't find ourselves back with third-party cases all over again, not on the basis of unseaworthiness, but on the basis of maritime negligence, which some court is going to say is ablute liability, the same as unseaworthiness. That's the problem, Mr. Chairman, that I am trying to direct my attention to."

"Mr. Mittelman.

"The one point I really was leading up to is that you should treat this situation the same as a construction site where you have a number of different employees working on different contracts."

The denial of the shipowner's motions for a directed verdict in this case, if not reversed, will again result in a vessel owner being held liable without fault on its part for the negligence of the stevedore. To permit liability of the shipowner under these circumstances would be in complete disregard of §905(b) and its legislative history.

C. A longshoreman has a cause of action only for the injuries caused by the negligence of the shipowner and not of his stevedorer employer.

As stated by the Second Circuit in *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2 Cir. 1976), the 1972 revisions to the Longshoremen's and Harbor Workers' Compensation Act (LAHWCA), 33 U.S.C. Sec. 901 *et seq.*, abolished the doctrine of unseaworthiness as a basis of liability and "Congress did not intend that a concept of negligence approximating no-fault liability should take its place".

"Also eliminated was the concept of a non-delegable duty to provide a safe place to work." Id. at 507.

Section 905(b), as amended provides that a longshoreman may bring suit against a vessel based only on the negligence of the vessel but that "no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." Id. at 507.

"In preparing the 1972 revisions of the LAHWCA, Congress suggested landbased principles of negligence as the standard of care for vessels boarded by dock workers." Id. at 507.

As in all cases based on negligence a primary consideration is the duty owed to the plaintiff by the defendant. (*Palsgraff* v. *Long Island R.R.*, 248 N.Y. 339 (1928).

The Second Circuit and other Circuits have stated that the vessel owner has the duty to exercise reasonable care under the circumstances to furnish a longshoreman working on its vessel with a reasonably safe place to work. *But*, that this is *not* a non-delegable nor absolute duty to provide a safe place to work. *Napoli, supra; Bess* v. *Agromar Line*, 518 F. 2d 738, 741 (4th Cir. 1975); *Ramirez* v. *Toko Kaiun*, 385 F. Supp. 644 (N.D. Cal. 1974).

This was illustrated by the Supreme Court in *West* v. *United States*, 361 U.S. 118 (1959), at page 123,

> "Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty to exercise reasonable care to furnish a safe place to work. *But we do not believe that such a duty* was owed under the circumstances of this case." * * * The (vessel owner), having hired Atlantic to perform the overhaul and reconditioning of the vessel—including the testing—was under no duty to protect (the employee) from risks that were inherent in the carrying out of the contract." (emphasis supplied).

It is submitted that under the facts of the case presently before this Court there likewise was no duty upon appellant, Flota to protect the plaintiff from conditions created by his employer Universal that were inherent in carrying out of the contract.

In contracting to load and discharge cargo on board the vessels of the defendant, UMS agreed, among other things, to "provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and dock-crane operators, also foremen and other stevedoring supervision as are needed for the proper and efficient conduct of the work." Likewise, Universal agreed to, "load and lay dunnage boards (except freighted dunnage lumber) as required during loading for proper stowage of cargo."

If plaintiff's accident occurred due to the fault of any one other than the plaintiff himself, it cannot be disputed, but that it was the fault of the stevedore in the manner in which it loaded the cargo and placed separation paper over it.

The issues are not the same as *Napoli, supra.* In that case, there was an open and obvious condition in an area

that was not under the contracting stevedores control, the shipowner and stevedore was the same company, and,

> "There was also a dispute as to whether the plywood had been placed on the drums by the ship's crew or the longshoremen." At page 506.

There is no such dispute as to who loaded the cargo in this case. We believe that the shipowner is not liable for the manner or method used by the stevedore, who is the expert in loading and discharging vessels, in performing its work.

Napoli, supra, recognized this in stating that the vessel was, "liable for its own negligence, relieving it of liability only for the negligence of those engaged in providing stevedoring services." At page 507.

The testimony in this case is consistent with the recognition of the Courts that the stevedores are the experts in loading and discharging vessels. As stated in *Teofilovich* v. *d'Amico Mediterranean/Pacific Line,* 415 F.S. 732 (U.S.D.C., C.D. Cal., 1976), citing *Judith Ann Liberian Transport Corp.* v. *Crawford,* 399 F. 2d 924 (9th Cir. 1968),

> "The court states that '(s)tevedores are the acknowledged experts in this field. It would hardly serve to minimize accidents to require that they be replaced by inexperienced crew members . . .' This is why the courts created the right to indemnity in the first place, and also why Congress gave the shipowner immunity from vicarious liability for the negligence of the stevedore when it took away the shipowner's right to indemnity." At page 735.

As further stated in that case at pages 735 and 736,

> "In its legislative history, Congress '. . . rejected the thesis that a vessel should be liable without

> regard to its fault for injuries sustained by employees covered under the Act while working on board the vessel.' 3 U.S. Code Cong. and Admin. News 4702 (1972). Congress pointed out that '(t)he purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in nonmaritime employment ashore, insofar as bringing a third party damage action is concern, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', "nondelegable duties', or the like . . . (and) a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act (citations) for the manner or method in which stevedores or employees of stevedores subject to this act perform their work (citations) for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship or ashore (citations). . . .' *Id.* at 4703. By this Congress specifically excluded a rule of vicarious liability without fault and specifically excluded the concept of a non-delegable duty, . . ."

See also *Cummings* v. "SIDARMA", 409 F. Supp. 869, 871 (1976).

> "Thus, under the amended Act, a longshoreman can no longer recover against the ship by reason of negligence of a stevedore contractor by means of loading or unloading which render the ship unseaworthy."

POINT II

The shipowner's duty to longshoremen is to exercise reasonable care to turn over to the stevedore the vessel in a condition which an experienced stevedore can load and discharge cargo.

A. The shipowner's duty to provide longshoremen with a reasonably safe place to work is to be determined as of the time the work area is placed under the control of the stevedore.

A major question to be uniformly resolved by the Federal Courts under the 1972 Amendments is the extent of the shipowner's duty to supply a reasonably safe place to work to longshoremen. It has already been determined that this duty is neither absolute nor non-delegable. (Point I, supra). It is submitted that the duty, for those portions of the vessel turned over to and thereafter under the control of an independent contractor, must be determined as of the time the independent contractor assumes control.

This proposition was well stated by Judge Frankel, in *Pauciullo* v. *United Philippine Lines*, 74 Civ. 660 (decision dated July 28, 1976, and appended to this brief).

> "Under the Federal standards, a 'third party', such as defendant, is required to exercise reasonable care under the circumstances to provide longshoremen with a reasonably safe place to work. See e.g. *Napoli* v. *Hellenic Lines, Ltd.*, supra at 3842; *White* v. *United States*, 400 F. 2d 74 (4th Cir. 1968); *Solsvik* v. *Mareman Compania Naviera, S.A.*, 399 F. Supp. 712, 715 (W.D. Wash. 1975). This does not mean that the owner is liable for injuries resulting from unreasonable dangers created by the stevedore as unloading proceeds, see *Frasca* v. *Pru-*

dential-Grace Lines, Inc., 394 F. Supp. 1092, 1098 (D. Md. 1975), or for injuries caused by defective equipment that is in the process of being repaired by an independent contractor's employees, see *West* v. *United States*, 361 U.S. 118, 123 (1959), as was true before the 1972 amendments erased the right of land-based workers to sue the shipowner for unseaworthiness. *But there is, as there always has been, a duty to hand over the vessel to the stevedore in a condition that is reasonably safe for the stevedore's employees* performance of their duties." (emphasis supplied)

The same reasoning was applied in *Ramirez, supra,* at page 646,

> "In this instance the shipowner must (1) exercise ordinary care to place the ship and equipment in such conditions that an experienced stevedore will be able, when exercising ordinary care, to discharge the cargo in a workmanlike manner and with reasonably safety to persons and property, and (2) give the stevedore warning of any concealed or latent defects that are known by the shipowner."
>
> "The unloading operations were turned over to Marine Terminals Corporations an independent stevedoring contractor . . ."
>
> "Marine Terminals assumed complete control of the unloading; there is no evidence that any member of the crew or other employee of Toko Kaium K.K. was in any way involved in the operation."

In *Teofilovich, supra,* a stevedore was injured while walking on cargo loaded in an outport, as opposed to being loaded by a fellow longshoreman the day before, when the cargo upon which he was walking tilted. The stevedores had discharged the cargo in such a way that they formed

"stairs" in the front stow leading up to slabs of marble. The plaintiff "proceeded forward across the top of the stow, then started to climb down by stepping from one crate to another which formed the 'stairs'. He stepped first on one crate and then on a second crate. The second crate teetered and he fell approximately six feet to the deck, injuring his shoulder." Judge Curtis concluded in dismissing plaintiff's cause of action as a matter of law, at page 739,

> "In light of the foregoing discussion, this Court finds that plaintiff has failed to carry his burden of proof in proving that the vessel caused, actually knew of, in the exercise of reasonable care, should have known of, or had any responsibility for, the misalignment of the dunnage. Not only has plaintiff failed to introduce any evidence that the vessel officers had a duty to inspect minute details of a stow placed in the vessel by a stevedore more expert than they, *but he failed to prove that the defect in the dunnage existed before the vessel turned control of Hatch No. 4 over to the stevedore company.* (emphasis supplied)

B. A reasonably safe place to work, once provided by the vessel owner to the independent contractor does not become unsafe by a condition created by the longshoreman in the manner or method of the work performed by such independent contractor.

The evidence in this case is that when the No. 3 hatch, lower hold, of the CIUDAD DE IBAQUE was turned over to UMS it was, without more, a safe place to work. The area in which plaintiff was injured was, the morning before, completely empty. Certainly an experienced stevedore was able when exercising reasonable care, to load the cargo in a workmanlike manner and with reasonable safety to persons and property. (*Ramirez, supra.*)

A vessel owner does not breach its duty to supply a reasonably safe place to work where the condition which causes a longshoreman's injury is one created by the stevedore-contractor in control of the work area.

Congress stated and the cases have held that land based principles of negligence are to be used in formulating a federal standard of care.

The New York Court of Appeals in *Zucchelli* v. *City Construction Co.*, 4 N.Y. 2d 52 discussed the safe place to work doctrine in a construction site case. The Court said at pages 55-56,

> "The casualty occurred when some vertical wooden shoring shifted laterally and buckled, causing the collapse of the floor above, on which plaintiffs were pouring concrete. The uncontradicted testimony and the trial court finding was that all this had resulted from the negligent removal, by some of subcontractor Carrick's employees, of a wooden form encasing a horizontal beam, against which form had been braced the horizontal shoring or planking which later buckled. All this was part of Carrick's subcontract, all persons involved were Carrick's employees and the planking, forms, etc. were parts of Carrick's equipment and plant on the job. The owner and agent are, therefore, immune from liability under settled rules. The leading case is Iacono v. Frank & Frank Contr. Co. (259 N.Y. 377) which holds (p. 381) that the owner's obligation to furnish to a contractor's employees a safe place to work does not make the owner responsible to those employees for the sufficiency of the contractor's own plant, tools and methods. Citing Iacono (supra), we said in Broderick v. Cauldwell-Wingate Co. (301 N.Y. 182, 187); 'Nor is the general contractor obliged to protect employees of his

> subcontractors against the negligence of his employer or that of a fellow servant'. In the well-known case of Wohlfron v. Brooklyn Edison Co. (238 App. Div. 463, 466, affd. 263 N.Y. 547), it is said that the obligation of the owner or general contractor to furnish a safe place to work 'is clearly distinguishable from that arising through negligent acts of a subcontractor occurring as a detail of the work'. Hess v. Bernheimer & Schwartz Brewing Co. (219 N.Y. 415, 418) similarly makes it clear that the 'place' which under Section 200 of the Labor Law the owner (or general contractor) must make and keep safe does not include the subcontractor's own 'plant' and equipment or the very work he is doing. The statute does not put on the owner (or general contractor) a fresh obligation to supervise, in the interest of employees of the subcontractor, the latter's operation of its own plan through its own employees."

Likewise, in the present case the work being done by the stevedore, without dispute, was the cause of any condition which may have been responsible for the plaintiff's injuries and all persons involved are the employees of the independent contractor.

See also *Bidetto* v. *NYCHA,* 25 N.Y. 2d 848.

In *Wright* v. *Belt Associates,* 14 N.Y. 2d, 129, the Court stated,

> "Thus the case would fall within a well recognized exception to defendant's general duty to provide a safe place to work—that is, where the injury arises through the negligent acts of a subcontractor occurring as a detail of the work. (*Zuchelli* v. *City Construction Co.,* 4 N.Y. 2d 52; *Broderick* v. *Cauldwell-Wingate Co.,* 301 N.Y. 182; *Wohl-*

> *fron* v. *Brooklyn Edison Co.*, 238 App. Div. 463, Affd. 263 N.Y. 547). And if Cance '(subcontractor)' had the obligation to provide support for the cheek, defendant '(general contractor)' 'would not be required to alter its work schedule to protect Cance's employees from Cance's own defaults. No such secondary obligation devolves upon a general contractor' '(possessor of land)' and even when aware of dan rs caused by a subcontractor's plant, tools or me' ods." Page 134.

In *Employers Mutual Ins.* v. *Cesare*, 9 A.D. 2d 379, (First Depa t nent), the Court pointed out, at page 383,

> "Du.ring the course of construction dangerous conditions are created and corrected with great frequency. The duty to supply a safe place to work does not extend to the situation 'where the prosecution of the work itself makes the place and create the danger' (*Mullin* v. *Genesee County Elc. Light, Power and Gas Co.*, 202 N.Y. 275, 279)."

The evidence in this case is clear that any condition that was created which may have contributed to the plaintiff's injury was created by UMS during the course and in the detail of its work and while it was in control of the No. 3 hatch of the vessel.

The common law standard of care owed an independent contractor by a possessor of land is also set forth in *Persichilli* v. *Tri-Boro Bridge and Tunnel Authority*, 16 N.Y. 2d 136, 145 (1965).

> "It is by this time well settled that the duty to provide a safe place to work is not breached when the injury arises out of a defect in the sub-contractor's own plant tools and methods, or through negligent acts of the sub-contractor occurring as a detail of the work."

That this is so even where a statutory non-delegable duty is placed on the possessor of land was clearly held in *Culiani* v. *Great Neck Sewer Dist.*, 38 N.Y. 2d 885, 886 (1976).

> "Sec. 241 of the Labor Law imposes a non-delegable duty on the general contractor or owner to provide a safe place to work. However, he is not responsible for injuries caused by the negligent acts of sub-contractors when he, the owner or general contractor, has exercised no control or supervision of the work site. Under those circumstances there is no breach of the duty imposed by Sec. 241 of the Labor Law. (Citations omitted). To hold otherwise would result in the owner or general contractor being made a guarantor of the safety of all workmen at the site despite the negligence of any subcontractor and even in the absence of control or supervision by the owner or general contractor."

Flota, having a lesser duty (no nondelegable duty), cannot logically or properly be held liable to the employee of its independent contractor under the undisputed factual circumstances of this case.

In *Brletich* v. *U. S. Steel Corp.*, 285 Atl. 2d 133 (Sup. Ct. of Pa. 1971), it was held at page 136,

> "We find no error in the reliance of the lower court upon our decision in Hander, and agree with the conclusion of the court *en banc* that 'A landowner has a duty to see that the work being done on his land has the proper supervision, particularly when he has assembled volunteers and amateurs to do the work. However, when he turns the work to an independent contractor with experience and know-how, who selects his own equipment and em-

> ployees, the possessor of land has no further liability in connection with the work to be done.'"

The Court in *Cutlip* v. *Lucky Stores, Inc.*, 325 A. 2d 432 (Ct. of Appeals of Maryland, 1974), had before it a suit for wrongful death of an employee of a structural steel subcontractor against the landowner. The employee died on the job in the course of erecting the steel structure for the defendant landowner when a portion of the nearly completed building collapsed.

The Court set forth the general rule "that the employer of an independent contractor is *not* subject to liability for bodily harm caused to another by a tortious act or omission of the independent contractor." At page 435.

The Court stated at page 438,

> "The appellants (plaintiff) point to the defective concrete pier which collapsed as 'a pre-existing concealed peril' fulfilling *Le Vonas* '. . . abnormally dangerous condition of the premises. . . .' *We do not consider that Le Vonas contemplated the work product of a contractor erector after he takes control of the premises* as a 'dangerous condition of the premises' from which the contractor's employees must be protected by the owner to his peril. The abnormally dangerous conditions on the premises referred to in *Le Vonas do not include conditions which arise after and as a result of the independent contract.*" (emphasis supplied)

While Flota does not believe that the 'abnormally dangerous peril' doctrine has any relevancy to this case, it is clear that even with such a condition the accepted rule governs, i.e., the safe place to work is determined as of the time the independent contractor begins its work and an unsafe condition created during the course of the in-

dependent contractor's activities does not give rise to liability of the landowner.

See also *King* v. *Shelby Rural Electric,* 502 S.W. 2d 659, (Ct. of App. Ky. 1973), cases cited in that decision, and §409 Restatement of Torts 2d.

Congress expressly stated that the above standard was to govern under 905(b). As quoted in *Teofilovich,* supra at page 736,

> "'*a vessel shall not be liable in damages . . . for the manner or method in which stevedores or employees of stevedores subject to this act perform their work. . . .*'" (emphasis supplied)

We also believe that the case of *Slaughter* v. *S.S. Ronde,* 390 F. Supp. 637 (S.D. Ga. 1974), aff'd 509 Fed. 2d 973, (5th Cir. 1974), is strong support for the dismissal of this action. That Court held,

> "Reasonable care does not require ship's officers to inspect each hold daily, to be sure that the 'stevedore has properly performed the work which it was hired to perform and that they inspect so thoroughly that they discover a danger which is not readily apparent and which is not appreciated by the longshoremen themselves'." at page 644

In other words, there is no duty to so do on the shipowner.

POINT III

The duty to maintain No. 3 hatch as a safe place to work was that of the stevedore.

As has been expressly recognized in all written opinions under §905(b) and the legislative history, the shipowner no longer has an absolute continuing, nondelegable duty to supply longshoremen with a safe place to work. *Napoli,* supra, *Griffith,* supra, *Rameriz,* supra.

If these holdings mean anything, then without doubt, in this case Flota turned over and supplied UMS with a safe place to work which, by the very nature of its work and as expressly provided in the Flota-UMS contract, UMS was obligated to maintain. As observed by the Court in *Slaughter* v. *S.S. Ronde*, 390 F. Supp. 637, 645 (S.D. Ga. 1974), aff'd, 509 F. 2d [illegible] (5th Cir. 1974),

> "'the physical handling of an ordinary bale or bundle is the clearest example of a detail with the specific competence and peculiar responsibility of the stevedoring contractor' and that such is 'clearly . . . not the province or responsibility of the ship.'"

Furthermore, it was expressly provided in the Flota-UMS contract that UMS would, in the loading of cargo, load and lay dunnage boards for proper stowage of cargo (161a).

To hold Flota liable to the plaintiff in this case would not only be contradictory to statutory and case law, but in the reality of the working conditions aboard a vessel place an impossible, and in all honesty, absurd burden on the vessel. The only conclusion would be that a vessel owner, though inexperienced and forbidden to stow cargo (93a) would have the duty to unstow the cargo loaded

by the stevedore in order to find any latent defects the stevedore may have created during the performance of its work. Surely such a result is not suggested, warranted or proper.

CONCLUSION

The jury verdict in favor of plaintiff should be reversed and judgment directed for the defendant-appellant as a matter of law.

Respectfully submitted,

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375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MUNOZ

VS

FLOTA MERCHANTE GRANCOLOMBIANA

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

ROBERT FORD being duly sworn, deposes and says that he is over the age of 21 years and resides at 755 Hancock st, Bklyn NY

That on the 10th day of JAN 1977 at he served the annexed defendant-appellant's brief and appendix upon

ZIMMERMAN & ZIMMERMAN, 160 BROADWAY, NY, NY

in this action, by delivering to and leaving with said attorneys true cop thereof.

three copies of the brief and of the appendix

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 10th day of JAN 1977

Robert L. Ford

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977